UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BARBARA H. KADLEC, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	)	DOCKET NUMBER DC043?9010288 DATE: JUL 29 1991

Barbara H. Kadlec, Evanston, Illinois, pro se.

Michael D. Waldrop, Esquire, Berlin, West Germany, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has filed a petition for review of an initial decision that sustained her removal. For the reasons discussed below, we GRANT the petition under 5 U.S.C. § 7701(e), VACATE the initial decision, and REMAND the case for further adjudication consistent with this Opinion and Order.

BACKGROUND

The appellant was an Education Services Officer, GM-13, in the Education Division, Headquarters, U.S. Command, Berlin,

and U.S. Army Berlin (USCOB/USAB). On October 10, 1989, Lieutenant Colonel (LTC) Leonard B. Scott informed the appellant that her performance in four critical elements of the position was unacceptable, and provided her with 90 days to improve. On January 8, 1990, he proposed her removal after finding that her performance was still unacceptable. Colonel John E. Counts agreed with the proposal, and the agency effected the appellant's removal on February 16, 1990. Agency File, Tabs 4A, 4B, 4D, and 4E.

An administrative judge with the Board's Washington Regional Office sustained the agency's action. The administrative judge rejected the appellant's assertion that the agency should have updated her performance standards, which were written in 1987-88, before initiating a performance-based action. In this regard, the administrative judge found that the appellant did not contest the validity of her standards; indeed, she wrote the standards herself and discussed them with her supervisor at the time. The administrative judge found no evidence that the appellant's position had changed in ways that would require corresponding changes in her performance standards or that any changes in her performance requirements were unreasonable.

The administrative judge then found that the agency charges against the appellant were supported by substantial evidence. Under the first critical element, Organizational Planning, the appellant was assigned to "develop a program for GFY 90 which takes command needs and resources available into

account. Present this plan for approval to the G-3[1] NLT 20 Nov 1989." *See* Agency File, Tab 4E. The agency charged that the appellant missed the suspense date; attempted to make presentations on December 1 and 8, which were unacceptable; and failed to present the briefing on December 22 and 28, even after being given specific guidance. *See* Agency File, Tab 4D.

The administrative judge found that the agency presented memoranda by LTC Scott, dated December 5 and 15, 1989, to support its charge. *See* Agency File, Tab 4D (Tabs 2 and 3). She further found that the appellant admitted that her presentations on December 1 and 8 were not approved and did not claim that she ever made a successful presentation. *See* Agency File, Tab 4C. She thus found that the appellant did not contradict the agency's evidence. She further found that the appellant did not provide evidence of illness and of the job requirements that she asserted prevented her from performing the assignment.

Under the second critical element, Program Direction and Communications, the appellant was assigned to "answer questions on a tasker from the USCOB concerning the Education policy of non-US forces personnel participating in the education program." The agency charged that the appellant exceeded her authority in responding with a letter and note that changed education policy and failed to answer the questions. It asserted that the appellant failed to complete

[1] Apparently, the "G-3" is the head of the Education Services Division.

the task despite being given guidance. *See* Agency File, Tab 4D.

The administrative judge cited the agency evidence consisting of the inquiry, the "tasker," the appellant's draft response, the final agency response, and a memorandum for record concerning the deficiencies in the appellant's draft response and her failure to complete the task. *See* Agency File, Tab 4D (Tab 4). The administrative judge acknowledged the appellant's assertions that she did not intend to determine Command Policy, and that she was going to fulfill the assignment, but it was taken away from her. *See* Agency File, Tab 4C. The administrative judge found nothing in the appellant's assertions, however, that contradicted the agency's evidence that her draft was unacceptable.

Under the third critical element, Human Resources Management, the appellant was assigned to conduct regular meetings with the language instructors to address concerns the instructors had raised with the G-3 because they felt that the appellant was not willing to resolve them. The agency charged that although the appellant conducted an acceptable meeting on November 17, 1989, she failed to schedule a follow-up meeting in December. *See* Agency File, Tab 4D.

The administrative judge noted that the appellant did not dispute that she failed to schedule a meeting in December. She rejected the appellant's explanation that she did not schedule a meeting because most of the teachers would be on vacation and she did not have any new information to provide

them anyway. *See* Agency File, Tab 4C. She found that the agency wanted the meetings to improve morale, regardless of whether there was substantive information to impart. Thus, she concluded that the appellant was merely disagreeing with her assignment without contradicting the agency's evidence that she failed to accomplish one of her assignments during the performance improvement period.

Under the fourth critical element, Program Monitoring and Evaluation, the appellant was assigned to update the work order matrix accompanying her Civilian Performance Plan and to brief the G-3 on her internal control program. *See* Agency File, Tab 4E. The agency charged that the appellant did not perform this assignment, and submitted evidence consisting of a copy of the work order matrix, and the December 5 and 14 memoranda documenting her failure to conduct a successful briefing. *See* Agency File, Tab 4D (Tabs C, 2, and 3). The administrative judge acknowledged the appellant's assertion that she could not conduct a briefing due to limited staffing and other job commitments. *See* Agency File, Tab 4C. She found nothing in this assertion, however, to contradict the agency's evidence that the appellant failed to perform an assignment she was given during the performance improvement period.

The administrative judge noted that in her final submission to the regional office, the appellant argued that her husband's employment situation with the agency had an impact on her appeal. *See* Initial Appeal File (IAF), Tab 17.

The administrative judge rejected the appellant's attempt to raise this issue, however, finding that she had not shown good cause for redefining the issues on the date set for the record to close. *See* IAF, Tab 14. She found that she could not consider the matter because the agency had not been furnished with the evidence. Thus, she also denied the agency's motion to reopen the record on this basis.[2]

Finally, the administrative judge found that the agency gave the appellant an adequate performance improvement opportunity. She found that it adequately communicated the appellant's performance standards to her, gave her 90 days to show acceptable performance under the standards, and described in the October 10 memorandum the specific actions she was expected to accomplish and the ways her supervisors would assist her. The administrative judge found that the fact that the appellant let other duties interfere with her performance of the assignment did not render the performance improvement period inadequate. She further found that the appellant provided no evidence concerning how she was deprived of an adequate performance improvement period by lack of supervisory assistance.

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[2] The administrative judge noted, however, that the appellant's husband resigned on August 26, 1989, after his within-grade increase had been denied or delayed and his reassignment to a position in the states had been cancelled. She also found no evidence that the appellant and her husband were in the same direct chain-of-command.

ANALYSIS

An initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and her legal reasoning, as well as the authorities on which that reasoning rests. *See Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980). In cases involving a performance-based action taken under 5 U.S.C. Chapter 43 against a Performance Management and Recognition System employee, the material issues include whether the agency proved, by substantial evidence, that it did the following: Effected the appellant's removal under a performance appraisal system approved by the Office of Personnel Management (OPM); if it removed the appellant on the basis of fewer than all of the components of a performance standard for a critical element, proved that the appellant's performance warranted a below fully successful rating on the element as a whole; and provided the appellant with a reasonable opportunity to demonstrate acceptable performance. *See Griffin v. Department of the Army*, 23 M.S.P.R. 657, 663 (1984), *reconsideration denied, Nothman v. Department of the Army*, 29 M.S.P.R. 190 (1985); *Sandland v. General Services Administration*, 23 M.S.P.R. 583, 587 (1984); *Shuman v. Department of the Treasury*, 23 M.S.P.R. 620, 628 (1984). We find that the initial decision does not adequately resolve the

last two issues and the evidence of record is insufficient to allow us to decide them at this level.[3]

Specifically, the appellant asserts in her petition for review that the agency's charges were not based on her performance standards, and that even if the charges were proved, they were insufficient to show unacceptable performance of the critical elements as a whole.[4] In its October 10 memorandum, the agency set forth performance standards that the appellant was allegedly failing to meet. However, it did not list all of the performance standards for the critical elements, and thus presumably considered the

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[3] The appellant does not dispute the evidence showing that the Office of Personnel Management had approved the agency's performance appraisal system. *See* Initial Appeal File (IAF), Tab 16; Agency File, Tab 4G. In addition, the appellant has not contested the validity of her performance standards. IAF, Tab 16. Thus, we find that the agency has sustained its burden of proof on these issues.

[4] We recognize that the record does not show that the appellant clearly raised this issue below. However, this issue involves an element of the agency's case that it must prove by substantial evidence before the Board will sustain its action. *Shuman v. Department of the Treasury*, 23 M.S.P.R. 620, 628 (1984). Furthermore, we note that because the appellant is an employee under the Performance Management and Recognition System, the agency must show only that her performance of the critical elements was below fully successful, not that it was unacceptable. *See* 5 C.F.R. § 432.103(a). In this regard, we also note that the agency characterized the level of required improvement both as "minimum performance requirements" and as "fully successful level," *see* Agency File, Tab 4E, and described the appellant's performance alternatively as "unacceptable" and "unsatisfactory." *See* Agency File, Tabs 4B, 4D, and 4E. However, notwithstanding these ambiguities, the appellant was given specific instructions on what improvements were needed in her performance, and these instructions must be the basis for judging whether her performance improved to the requisite level.

appellant's performance of some of the standards acceptable. Cf. Agency File, Tabs 4E and 4F.

Moreover, in its notice of proposed removal, although the agency stated that the appellant's performance under the four critical elements was unacceptable, it did not specify what performance standards she had failed to meet. Agency File, Tab 4D. Rather, it simply set forth deficiencies in the appellant's performance during the improvement period without relating the deficiencies to any standards. Of course, by failing to relate the deficiencies to any standards, it also did not show that the appellant's failure to meet a particular standard justified a finding that her performance of a critical element containing multiple performance standards warranted a finding of below fully successful performance of the critical element as a whole. Agency File, Tab 4D. It is true that an agency may give content to an employee's otherwise valid written performance standards by informing the employee of the specific requirements and applications of the standards to her work situation through a performance improvement plan. *Baker v. Defense Logistics Agency*, 25 M.S.P.R. 614, 617 (1985), *aff'd*, 782 F.2d 1579, 1583 (Fed. Cir. 1986). However, an agency may not prove an employee's below fully successful performance of a critical element without regard to the written performance standard for that critical element. *See Williams v. Department of Health & Human Services*, 30 M.S.P.R. 217, 220 (1986).

The agency's decision letter does nothing to remedy this situation, simply repeating the phrase for all critical elements that "The evidence supports unsatisfactory performance on this critical element." Agency File, Tab 4B. Thus, we agree with the appellant that even if the agency has proved the specific deficiencies it cited in its notice of proposed removal, it has still not proved that they warrant a finding that the appellant failed to meet the critical elements for her position.

The parties did not submit evidence on this issue and the administrative judge did not address it in her initial decision. We find that this is a determination best made by the initial finder of fact. Thus, we find it appropriate to remand this case for a decision by the administrative judge on whether the agency proved by substantial evidence that the appellant's performance warranted a below fully successful rating on the critical elements as a whole. *See, e.g., Gruner v. Department of the Army*, 40 M.S.P.R. 333, 337-38 (1989); *Sanchez v. Department of the Air Force*, 27 M.S.P.R. 552, 554-56 (1985).

The administrative judge did address the issue of whether the agency provided the appellant with an adequate opportunity to demonstrate acceptable performance. We find, however, that this issue must be reconsidered in light of the administrative judge's finding on remand concerning the previous issue because if the agency did not adequately relate its requirements to the appellant's performance standards, it

arguably did not provide her with a reasonable opportunity to improve. In addition, we note the appellant's argument, not specifically addressed by the administrative judge, that her supervisors never informed her during the improvement period that they considered her performance unacceptable.[5]

On remand, the administrative judge should resolve the following issues: (1) Whether the appellant's deficiencies constituted below fully successful performance under her performance standards; (2) if so, whether the appellant's below fully successful performance under fewer than all of her standards warranted a finding that her performance of the critical elements as a whole was below fully successful; and (3) whether the appellant was provided with a reasonable

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[5] The appellant implies that the agency had questionable motives in taking the action against her; specifically, she discusses the agency's refusal to put her in a priority placement service and matters involving her husband's resignation from the agency. Even if we considered these matters to be properly raised at this level, we would find that they are irrelevant to the appellant's appeal because she did not allege any affirmative defenses of discrimination or reprisal in connection with her removal. In addition, we find it unnecessary to address the appellant's assertion that she was not given an adequate opportunity to respond to her proposed removal. The record does not indicate that she presented this assertion to the administrative judge and the Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980).

opportunity to improve. If necessary, the administrative judge may grant the parties the opportunity to submit additional argument and evidence on these issues.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.